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IN THE

Supreme Court of the United States

OCTOBER TERM, 1940

No. 76

GEORGE A. McBRIDE,
Assignor to the Western Cartridge Company, a Corporation,

Petitioner,

vs.

OLIVER J. TEEPLE,
Assignor to the E. I. du Pont de Nemours & Company,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Customs and Patent Appeals in a Patent Interference Proceeding.

BRIEF FOR RESPONDENT IN OPPOSITION

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June 11, 1940.

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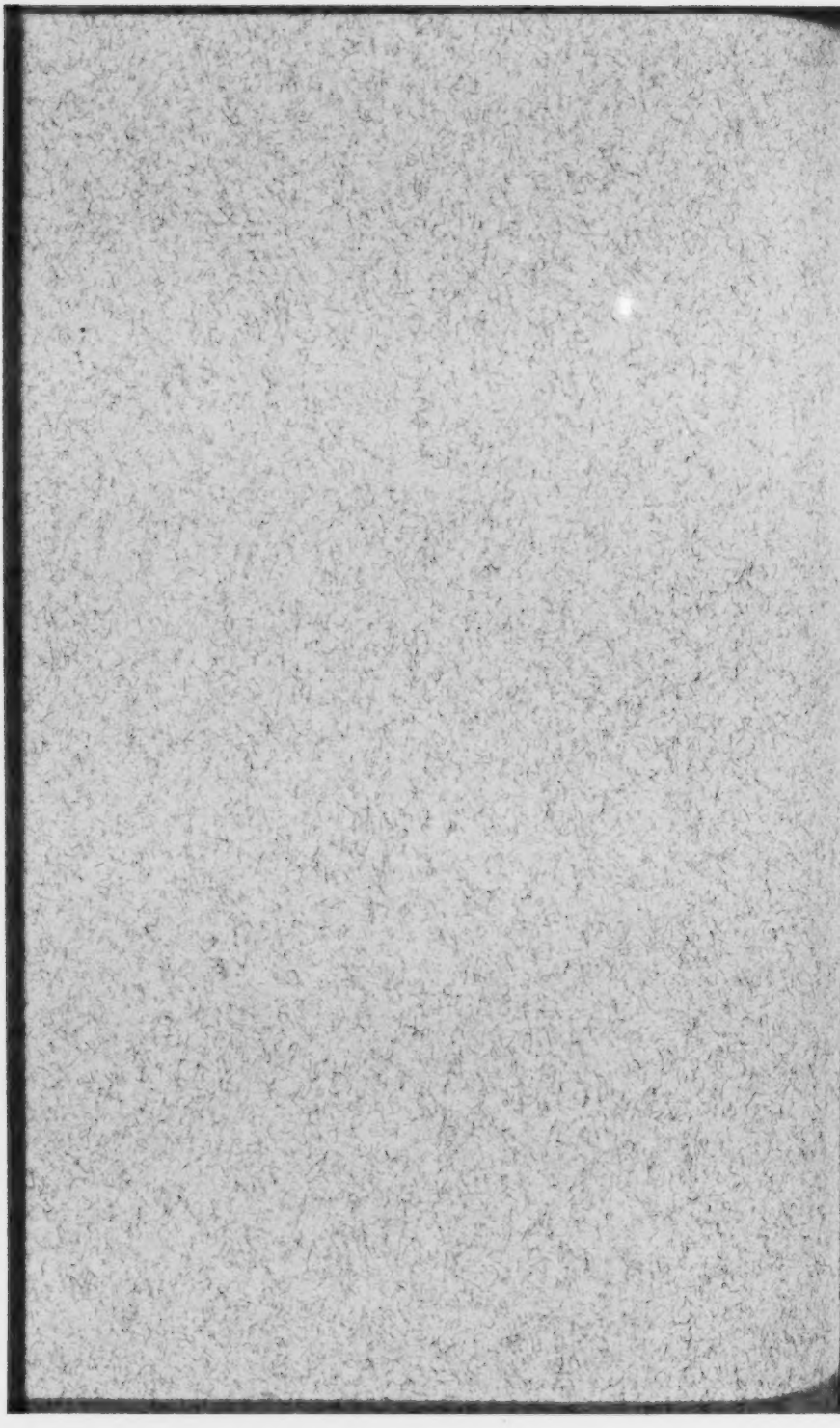

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On Petition for a Writ of Certiorari to the United States Court of Customs and Patent Appeals in a Patent Interference Proceeding.

BRIEF FOR RESPONDENT IN OPPOSITION

STATEMENT OF THE CASE.

The petition of George A. McBride prays that a writ of certiorari issue to review a decision of the United States Court of Customs and Patent Appeals (109 F. (2d) 789) rendered on February 26, 1940 in a Patent Interference proceeding under Section 4914 R. S. (35 U. S. C. A. § 62) on appeal from the United States Patent Office (R. 575-

595). Petitioner's statement of the case is such that it needs amplification and correction.

The decision of the United States Court of Customs and Patent Appeals which the petitioner seeks to have reviewed reversed the decision of the Board of Appeals of the United States Patent Office awarding priority to respondent with respect to count 1 of the Interference proceeding and remanded the cause to the United States Patent Office in order that a finding might be made as to that count on the question of petitioner's diligence (R. 592). As to all other counts of this Interference, the Court of Customs and Patent Appeals affirmed the concurring decisions of the Patent Office tribunals awarding priority to respondent (R. 595). The petition for writ of certiorari relates solely to count 1 (Petition, p. 2, line 15) on which this Interference has been remanded by the Court of Customs and Patent Appeals to the Patent Office for a finding of fact as to petitioner's diligence.

Respondent is involved in this Interference proceeding on Patent No. 1,924,465, issued August 29, 1933 (R. 27), which was filed during the pendency of and is a continuation in part of his copending application filed February 4, 1931 (R. 31). The Court of Customs and Patent Appeals affirmed the concurring findings of the Patent Office tribunals holding that respondent is entitled to February 4, 1931, the date of his earlier filed copending application as his record date not only for conception but also for constructive reduction to practice of the invention embraced in count 1 (R. 588).

Petitioner is involved in this Interference proceeding on an application filed November 5, 1934 (R. 13), more than a year after the issuance of respondent's patent. More than six months prior to the date of filing petitioner's application involved in this Interference, there was issued to peti-

tioner on April 24, 1934, Patent No. 1,955,927, the application for which was filed November 14, 1930 (R. 9). None of the claims of petitioner's patent embrace the invention here involved (R. 577-578). This patent of petitioner's is not directly involved in this Interference but is relied upon by petitioner as evidence to establish his claim to an award of priority as to count 1 (R. 595).

The Examiner of Interferences held that petitioner's patent did not disclose the issue and made no express finding with respect to petitioner's diligence (R. 480). The Board of Appeals decided that petitioner's patent was a sufficient disclosure with respect only to count 1 of the Interference, but made no finding with respect to petitioner's diligence, holding that petitioner had not raised the question of diligence before the Examiner of Interferences (R. 490). The Board of Appeals further agreed with the Examiner of Interferences that inasmuch as there was a hiatus between the time the earlier application of petitioner eventuated into a patent on April 24, 1934, and the filing on November 5, 1934 of petitioner's application involved in this Interference, petitioner was only entitled to conception as to any counts which would read upon this earlier application (R. 490).

The Court of Customs and Patent Appeals agreed with the Board of Appeals of the Patent Office that petitioner was entitled to the date of his early application November 14, 1930, upon which his patent was issued, for conception of the invention embraced in count 1 (R. 584). The Court further agreed with the Board of Appeals that petitioner was not entitled to the date of this early application for constructive reduction to practice of the invention as to count 1 because there was a hiatus between the date of issue of petitioner's patent upon this application and the time of filing of petitioner's application involved in this Interference (R. 584). Contrary to petitioner's assertion

at the top of page 3 of his petition, the Court of Customs and Patent Appeals did not hold that petitioner's early application constituted a constructive reduction to practice at any time.

The Court stated that they had held in *Conover* v. *Downs*, 35 F. (2d) 59 (1929), that where an application involved in an interference was not filed until after the grant of a patent disclosing but not claiming the invention, the filing of the application which matured into a patent was not a constructive reduction to practice of the invention in issue and that the situation in the present case was exactly that which existed in the *Conover* case (R. 584). The Court adhered to the views expressed in *Conover* v. *Downs, supra,* and held that while petitioner was entitled to the date of his early application November 14, 1930 for conception of the invention embraced in count 1, that application did not constitute a constructive reduction to practice of the same (R. 585).

The Court further held that while petitioner was the first to conceive the invention embraced in count 1, he was the last to reduce it to practice and that, under these circumstances, the question of diligence by petitioner from immediately prior to respondent's entry into the field on February 4, 1931 should be determined before there could properly be an award of priority (R. 590). The Court stated:

> ". . . it is our opinion that in the interest of justice, before making an award of priority, the question of appellant's diligence should be determined, and it is our conclusion that, as to said count 1, the decision of the board should be reversed in order that such finding may be made by the proper Patent Office tribunals." (R. 592)

Thereafter, on March 18, 1940, petitioner filed in the Court of Customs and Patent Appeals a petition for rehearing requesting that Court to reconsider and reverse

the long existing rule of the Patent Office with respect to lack of continuity in applications which prevents a prior patent from being considered as a constructive reduction to practice as stated in *Conover* v. *Downs, supra,* and expressly affirmed in many other cases. The Court of Customs and Patent Appeals denied this petition for rehearing on April 5, 1940 (R. 597). This Interference is now pending before the United States Patent Office for a determination on the issue of petitioner's diligence under the mandate of the Court of Customs and Patent Appeals issued to the Commissioner of Patents on April 15, 1940 (R. 597).

SUMMARY OF ARGUMENT.

In support of respondent's contention that the petition for writ of certiorari should be denied, respondent's arguments are directed to establishing the following propositions:

1. There is neither statutory authority nor constitutional power for jurisdiction to review on certiorari a decision of the United States Court of Customs and Patent Appeals in a patent interference proceeding on appeal from the United States Patent Office. The decision of the Court of Customs and Patent Appeals in a patent interference proceeding is merely an administrative decision and not a judicial judgment.

2. The petition should be denied as premature. There is no final judgment in this Interference as the United States Court of Customs and Patent Appeals has made no award of priority as to count 1, but has remanded the Interference to the Patent Office for further proceedings. Should it be ultimately determined in the further proceedings in this Interference that petitioner was diligent, then the question which petitioner now seeks to raise on certiorari will have become moot.

3. There is no real conflict between the decision of the United States Court of Customs and Patent Appeals in this Interference proceeding and the decision of this Court in *Alexander Milburn Co.* v. *Davis-Bournonville Co.*, 270 U. S. 390, 70 L. Ed. 651 (1926). The *Milburn* v. *Davis* case was an infringement suit in which the issue for determination was the validity of the patent there in suit. No issue was involved in that case as to any right of the patentee of the earlier filed application to subsequently claim the invention in an application filed after the issue of his patent.

In an interference proceeding there is no issue of validity, but only that of priority of invention for purposes of making an award of priority of the subject matter in issue. Petitioner is here claiming the invention in an application filed subsequently to the issue of his earlier patent disclosing but not claiming said invention and seeks to have an award of priority in this Interference based solely upon the filing date of his earlier patent without showing that he was diligent. The issue in this Interference is priority of invention for the purpose of establishing petitioner's right to claim the invention, not the validity of respondent's patent.

The historic policy of the Patent Office, as stated by the Court of Customs and Patent Appeals in *Conover* v. *Downs*, 35 F. (2d) 59 (1929), is to permit an application involved in interference to take the filing date of an earlier filed application of the same party only where the applications were copending and not to give a **continuing** date of application where a hiatus exists. Where the applications are not copending diligence must be shown between the date of the earlier filed application and the date of filing of a subsequent application claiming the invention. Even though a party files his application and discloses the subject matter of invention without claiming same, there is a presumption of abandonment and dedication to the public upon issue

of the patent in the absence of a copending application. Where there is abandonment of the invention by the original application having matured into a patent prior to the filing of a subsequent application claiming the invention, the latter can not be a continuance of the first.

ARGUMENT.

I.

LACK OF JURISDICTION.

A. There Is No Statutory Authority for this Court to Review Decisions of the Court of Customs and Patent Appeals in Patent Cases.

Petitioner invokes the jurisdiction of this Court under Sections 195 and 240-A of the Judicial Code, Title 28, United States Code, Sections 308 and 347 (Rules 42 and 38). (Petitioner's Br. p. 6) Neither Section 240 nor any other section of the Judicial Code makes any provision for certiorari in patent cases to the United States Court of Customs and Patent Appeals. Rule 38 of this Court makes no provision therefor.

The only statutory provision authorizing review by certiorari of decisions of the United States Court of Customs and Patent Appeals is Section 195 of the Judicial Code, as amended (28 U. S. C. A. § 308). However, Section 195 of the Judicial Code relates only to customs cases. It does not refer to either patent or trade-mark cases. Section 195 of the Judicial Code, as amended (28 U. S. C. A. § 308), upon which petitioner relies, provides as follows:

> "The Court of Customs and Patent Appeals shall exercise exclusive appellate jurisdiction to review by appeal, as herein provided, final decisions by the United States Customs Court in all cases as to . . . and the judgments and decrees of said Court of Customs

> and Patent Appeals shall be final in all such cases: *Provided, however,* That in any case in which the judgment or decree of the Court of Customs and Patent Appeals is made final by the provisions of this title, it shall be competent for the Supreme Court, upon the application of either party, duly made as required by section 350 of this title, to require, by certiorari or otherwise, such case to be certified to the Supreme Court for its review and determination, . . . "

Rule 42 of this Court contains the statement "(See sec. 195 Judicial Code, as amended or sec. 7 of the Act of February 13, 1925.)". This plainly indicates that Rule 42, so far as it concerns review of judgments of the Court of Customs and Patent Appeals, relates solely to Section 195 of the Judicial Code. It is very clear that Section 195 of the Judicial Code provides only for customs cases and is not applicable to either patent or trade-mark cases.

The Act of March 2, 1929, Chapter 488 (45 Stat. 1475, 1476; 28 U. S. C. A. § 309a), which transferred jurisdiction of appeals from the Patent Office in patent and trade-mark cases from the Court of Appeals of the District of Columbia to the United States Court of Customs and Patent Appeals, contains no provision purporting to authorize the Supreme Court to review the decisions of the Court of Customs and Patent Appeals in such cases. Subsequent to this Act of March 2, 1929, transferring jurisdiction to the Court of Customs and Patent Appeals, Section 195 of the Judicial Code was amended by Congress on June 17, 1930, but this amendment related only to customs cases and did not confer jurisdiction upon this Court in patent and trade-mark cases.

Under the Act of March 2, 1927, Chapter 273 (44 Stat. 1336; 35 U. S. C. A. §§ 59a, 63), which amended R. S. 4911 and 4915, an applicant for a patent which has been refused in an interference proceeding in the Patent Office

must elect either to appeal to the Court of Customs and Patent Appeals or bring a bill in equity in the Federal courts. Where he elects to bring a bill in equity he may pursue his remedy in the proper United States Circuit Court of Appeals from which an application to this Court may be made under Section 240(a) of the Judicial Code as amended for review on certiorari. Petitioner elected not to bring a bill in equity but to appeal to the United States Court of Customs and Patent Appeals (R. 1) and by such election he has waived his right to proceed in the Federal courts, together with such remedies as apply solely to proceedings in such Federal courts.

Section 240 of the Judicial Code contains no provision for certiorari to the Court of Customs and Patent Appeals. Section 240(a) of the Judicial Code, as amended (28 U. S. C. A. § 347-a), upon which petitioner relies, is as follows:

> "(a) In any case, civil or criminal, in a circuit court of appeals, or in the Court of Appeals of the District of Columbia, it shall be competent for the Supreme Court of the United States, upon the petition of any party thereto, whether Government or other litigant, to require by certiorari, either before or after a judgment or decree by such lower court, that the cause be certified to the Supreme Court for determination by it with the same power and authority, and with like effect, as if the cause had been brought there by unrestricted writ of error or appeal."

This Section provides only for certiorari to Circuit Courts of Appeals and the Court of Appeals of the District of Columbia.

In *Pacific Northwest Canning Co.* v. *Skookum Packers' Association*, 283 U. S. 858, 75 L. Ed. 1464 (1931), this Court denied for want of jurisdiction, a petition for certiorari to the Court of Customs and Patent Appeals in a trade-mark opposition proceeding, stating:

> "Petition for writs of certiorari to the Court of Customs and Patent Appeals denied for want of jurisdic-

tion. Sec. 240, Judicial Code; Sec. 347, U. S. Code; Title 28; *Postum Cereal Co.* v. *California Fig Nut Co.*, 272 U. S. 693."

It is apparent that the statutes relied upon by petitioner do not support the jurisdiction of this Court on certiorari to the Court of Customs and Patent Appeals in patent cases and that there is no statutory authority warranting review of this Patent Interference proceeding.

B. The Decision of the Court of Customs and Patent Appeals in Patent Cases is An Administrative Decision Which this Court May Not Constitutionally Be Called Upon to Review.

Petitioner, on page 11 of his brief, attempts to distinguish the holding of this Court in *Postum Cereal Co.* v. *California Fig Nut Co.*, 272 U. S. 693, 71 L. Ed. 478 (1927), on the ground that this case was decided prior to the Act of March 2, 1927, at which time there was still open to the parties the opportunity to pursue the concurrent remedy in equity. The fact that when the *Postum Cereal* case was decided an applicant might bring a bill in equity even after pursuing his appellate remedy, whereas since the Act of March 2, 1927 the remedies by appeal and by bill in equity are mutually exclusive, certainly cannot change the administrative decision into a judicial judgment.

Contrary to petitioner's assertion on pages 8 and 9 of his brief, the decision of the United States Court of Customs and Patent Appeals under R. S. 4914 is not res adjudicata. *Morgan* v. *Daniels*, 153 U. S. 120, 38 L. Ed. 657 (1894), relied upon by petitioner, holds that where the question decided in the Patent Office is one between contesting parties as to priority of invention, the decision there made must be accepted as controlling upon that question of fact in any subsequent suit between the same parties unless the contrary is established by testimony which in character and amount carries thorough conviction. The de-

cision of the Court of Customs and Patent Appeals in this Interference does not preclude petitioner from contesting the validity of respondent's patent in any court where it may be called in question. R. S. 4914 (35 U. S. C. A. § 62) expressly provides as follows:

> ". . . But no opinion or decision of the court in any such case shall preclude any person interested from the right to contest the validity of such patent in any court wherein the same may be called in question."

The following statement of this Court in the *Postum Cereal* case, *supra*, is applicable to the present case:

> ". . . It is a mere administrative decision. It is merely an instruction to the Commissioner of Patents by a court which is made part of the machinery of the Patent Office for administrative purposes. In the exercise of such function it does not enter a judgment binding parties in a case as the term 'case' is used in the third article of the Constitution. Section 9 of the Trade-Mark Act of 1905, applies to the appeal taken under it the same rules which under § 4914, Rev. Stat. Comp. Stat. § 9459, 7 Fed. Stat. Anno. 2d ed. p. 202, apply to an appeal taken from the decision of the Commissioner of Patents in patent proceedings. (*citation of authorities.*) Neither the opinion nor decision of the court of appeals under § 4914, Rev. Stat. or § 9 of the Act of 1920, precludes any person interested from having the right to contest the validity of such patent or trade-mark in any court where it may be called in question. This result prevents an appeal to this court, which can only review judicial judgments. . . ." (Pp. 698-699)

In *Frasch* v. *Moore*, 211 U. S. 1, 53 L. Ed. 65 (1908), which is cited in the *Postum Cereal* case, *supra*, this Court denied certiorari to the Court of Appeals of the District of Columbia in a patent appeal, stating:

> ". . . in interference cases and in all others going up from the Commissioner to the Court of Appeals there is no final judgment in the cause, but one interlocutory in its nature, and binding only upon the Com-

> missioner, 'to govern the further proceedings in the case.' The opinion or decision of the court, reviewing the Commissioner's decision, is not final, because it does not preclude any person interested from contesting the validity of the patent in court; . . ." (P. 9)

It is clear that the decision of the Court of Customs and Patent Appeals in this case is not a final judgment. However, even though the decision of the Court of Customs and Patent Appeals in this Interference were a final judgment, the character of the decision would not be changed from an administrative one into a judicial judgment. This Court's decision in the *Postum Cereal* case is apposite in this connection, as follows:

> "It was said in these cases that the appeal was denied because the action of the court of appeals was not a final judgment. This reason was a true one, but it should not be understood to imply that in such a proceeding, circumstances might give it a form that would make it a final judgment subject to review by this court. That is the error that the appellant here has made in pressing its appeal. . . . Whatever the form of the action taken in respect of such an appeal, it is not cognizable in this court upon review, because the proceeding is a mere administrative one." (Pp. 699-700)

This Court made it clear that the decision in the *Postum Cereal* case was based not upon lack of finality of the decision of the appellate court, but upon the administrative nature of the proceedings. This is confirmed by the fact that subsequent to the Act of March 2, 1927, requiring election of remedies, this Court in *Pacific Northwest Canning Co.* v. *Skookum Packers' Association*, 283 U. S. 858, 75 L. Ed. 1464 (1931) *supra*, denied for want of jurisdiction the petition for certiorari to the Court of Customs and Patent Appeals in a trade-mark opposition proceeding and cited as authority therefor the *Postum Cereal* case.

Petition for writ of certiorari to the United States Court of Customs and Patent Appeals has been denied in the fol-

lowing patent interference proceedings: *Fessenden* v. *Wilson*, 284 U. S. 640, 76 L. Ed. 544 (1931); *Chase* v. *Avery*, 307 U. S. 638, 83 L. Ed. 1519 (1939). The writ was also denied in the following ex parte patent appeal cases: *Laughlin* v. *Robertson*, 284 U. S. 652, 76 L. Ed. 553 (1931); *Keller, Heumann & Thompson Co.* v. *Coe*, 298 U. S. 656, 80 L. Ed. 1382 (1936). No petition for writ of certiorari to the United States Court of Customs and Patent Appeals in patent cases has ever been granted.

It is plain that not only statutory authority but constitutional power for jurisdiction is lacking in the present Patent Interference proceeding.

II.

THE PETITION SHOULD BE DENIED AS PREMATURE.

No final judgment of priority as to count 1 has been rendered by the Court of Customs and Patent Appeals in this Interference proceeding. The decision of the Court merely remands this Interference to the Patent Office for further proceedings. Should it be ultimately determined in the further proceedings in this Interference that petitioner was diligent, then the question which petitioner now seeks to raise on certiorari will have become moot.

Since the Court made no award of priority as to count 1, but remanded the Interference to the Patent Office for further proceedings, there is no final judgment in this Interference and this fact alone furnishes sufficient ground for the denial of the writ. *Hamilton-Brown Shoe Co.* v. *Wolf Brothers & Co.*, 240 U. S. 251, 60 L. Ed. 629 (1916).

III.

THE DECISION OF THE COURT OF CUSTOMS AND PATENT APPEALS IN THIS INTERFERENCE IS NOT IN CONFLICT WITH THE DECISION OF THIS COURT IN MILBURN CO. v. DAVIS-BOURNONVILLE CO.

Petitioner alleges a conflict between the decision of the Court of Customs and Patent Appeals in this Interference holding that petitioner's patent filed November 14, 1930 constituted nothing more than evidence of conception, and this Court's decision in *Alexander Milburn Co.* v. *Davis-Bournonville Co.*, 270 U. S. 390, 70 L. Ed. 651 (1926). The Court's decision in this Interference was based fundamentally upon the fact that petitioner's patent, the application for which was filed November 14, 1930, had issued on April 24, 1934, and that **thereafter** on November 5, 1934, petitioner filed his interfering application, thus creating a gap or hiatus between the issuance of his patent and the filing of his application involved in this Interference.

The *Milburn* v. *Davis* case, *supra,* was an infringement suit in which the issue for determination was the validity of the patent there in suit. No issue was involved in that case as to any right of the patentee of the earlier filed application to subsequently claim the invention in an application filed after the issue of his patent.

In an interference proceeding in the Patent Office and on appeal to the Court of Customs and Patent Appeals no issue of validity is involved. An interference proceeding deals only with the question of priority of invention in order to make an award of priority of the subject matter in issue. In this Interference proceeding claim 1 of respondent's patent is involved as count 1, but there is no issue of validity. Neither the Patent Office nor the Court of Customs and Patent Appeals has any jurisdiction to declare a patent

once granted invalid. Petitioner is here claiming the invention in an application filed subsequently to the issue of his earlier patent disclosing but not claiming said invention and seeks to have an award of priority in this Interference based solely upon the filing date of his earlier patent without showing that he was diligent. The issue in this Interference is priority of invention for the purpose of establishing petitioner's right to claim the invention, not the validity of respondent's patent.

The decision of the Court of Customs and Patent Appeals in this Interference proceeding is in accordance with its decision in *Conover* v. *Downs,* 35 F. (2d) 59 (1929), which states the historic policy and practice of the Patent Office. The long existing practice of the Patent Office, as stated in *Conover* v. *Downs, supra,* is to permit an application involved in interference to take the filing date of an earlier filed application of the same party only where the applications were copending and not to give a **continuing** date of application where a hiatus exists. Where the applications are not copending, diligence must be shown between the date of the earlier filed application and the date of filing of a subsequent application claiming the invention. Otherwise, a party could file an application disclosing but not claiming an invention and would be perfectly safe in waiting for any period short of two years after the issue of his patent to file an application claiming the invention so disclosed. This would be a means of continuing the period of the patent monopoly to the detriment of the public.

The decision of the Court of Customs and Patent Appeals in this Interference is in conformity with the decisions of the Federal courts in infringement cases which hold that where a party obtains a patent disclosing subject matter not claimed by the patentee, there is a presumption that such subject matter is dedicated to the public. This is true

under the decisions even though the later application is filed within two years of the issue date of the prior patent.

The now accepted doctrine is that where a patent discloses subject matter not claimed, it is dedicated to the public where there is no copending application. *Sontag Chain Stores Co.* v. *National Nut Co. of California,* No. 671, Oct. Term 1939, U. S. Supreme Court, decided May 20, 1940; *Ball & Roller Bearing Co.* v. *F. C. Sanford Mfg. Co.,* 297 F. 163 (C. C. A. 2, 1924); *O. H. Jewell Filter Co* v. *Jackson,* 140 F. 340 (C. C. A. 8, 1905); *Directoplate Corp.* v. *Donaldson Lithographing Co.,* 51 F. (2d) 199 (C. C. A. 6, 1931); *Elevator Supplies Co., Inc.* v. *Graham & Norton Co.,* 44 F. (2d) 358 (C. C. A. 3, 1930); *Gladding-McBean Corp.* v. *N. Clark & Sons,* 16 F. (2d) 50 (C. C. A. 9, 1926).

In these cases the Federal courts base their decisions on the legal theory that there has been a dedication to the public of the subject matter disclosed but not claimed, and the Patent Office and the Court of Customs and Patent Appeals have arrived at the same result by the hiatus doctrine, as stated in *Conover* v. *Downs, supra.* The Patent Office and the Court of Customs and Patent Appeals do not differ with the rule stated in the *Milburn* v. *Davis* case that a party is entitled to a constructive reduction to practice as of his filing date, but these tribunals hold in effect that even though a party files his application and discloses the subject matter of invention without claiming same, there is a presumption of abandonment and dedication to the public upon issue of the patent where there is no copending application.

It has been the practice of the Patent Office since the decision of the Supreme Court in the Corn-Planters' patent, *Brown* v. *Guild,* 90 U. S. (23 Wall.) 181, 23 L. Ed. 160 (1874), that an abandoned application could not be used as an anticipation or as a completed invention. This Court referred to the doctrine of *Brown* v. *Guild* in the *Milburn* v.

Davis case with apparent approval. The Court of Customs and Patent Appeals has followed this legal rule in its decision in *Euth* v. *Oliver*, 70 F. (2d) 110 (1934), and compares this doctrine with the *Conover* v. *Downs* decision, having in mind in both cases the same point, namely, that there was an abandonment of the invention. The Court of Customs and Patent Appeals in the case of *Writer* v. *Kiwad*, 63 F. (2d) 259 (1933), in referring to *In re Spitteler*, 31 App. D. C. 271 (1908), and *Conover* v. *Downs, supra*, stated that where the original application matured into a patent prior to the filing of an alleged divisional application the latter **was not a continuance** of the first.

It is thus apparent that there is no real conflict between the decision of the Court of Customs and Patent Appeals in this Interference proceeding and the decision of this Court in *Milburn* v. *Davis, supra*, but on the contrary there is full agreement.

The petitioner has not pointed out wherein any conflict exists between the case of *Harper* v. *Zimmermann*, 41 F. (2d) 261 (D. C. D. Dela., 1930), referred to on page 4 of his petition, and the decision of the Court of Customs and Patent Appeals in this Interference. *Harper* v. *Zimmermann* was an interference suit in equity under R. S. 4915, as amended (35 U. S. C. A. § 63) to obtain letters patent and no conflict is apparent with the decision in the case at bar. The case of *Cleveland Trust Co.* v. *Thomas*, 1 F. Supp. 917 (D. C. D. Mass., 1932), referred to by petitioner on page 4 of his petition, was an interference proceeding in equity under R. S. 4915 (35 U. S. C. A. § 63) to obtain letters patent. A reissue patent was involved in that case and the court held that the reissue patent was entitled to the filing date of the original application. This difference in the factual situation shows there is no conflict between the *Cleveland Trust* case and the decision in the present case.

CONCLUSION.

It is urged that for the various reasons stated above the petition for writ of certiorari should be denied.

Respectfully submitted,

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